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Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-296

JOHN COSMO LEGARI,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming judgment of the United States District Court for the Eastern District of New York.

THE OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is set forth in Appendix A, infra page A1.

JURISDICTION

The Judgement of the Circuit Court of Appeals for the Second Circuit was entered on June 21, 1972.

Jurisdiction of this Court is invoked under Title 28, Section 1254, United States Code.

STATEMENT OF CASE

On June 23, 1971, upon verdict of a jury before the Honorable John Bartels, United States District Court for the Eastern District of New York, a judgment of conviction was entered against John Cosmo Legari for the crime of violation

of Title 18, U.S.C., Section 946.2. Co-defendants Massarotti and Burken were also convicted. Petitioner was sentenced on October 15, 1971 to a term of two (2) years. On June 21, 1972, the United States Court of Appeals affirmed the Judgment of the District Court.

The facts of this case, concerning John Cosmo Legari, are not complicated in that the stolen merchandize involved was stipulated to be interstate in nature.

An Agent of the Federal Bureau of Investigation, Edward J. McGoey, testified for the Government, stating that he and a fellow agent, James F. Ahern, recognized by chance a stolen trailer-truck parked in a lot at 1919 Utica Avenue, Brooklyn, New York, on October 9, 1969. After one hour of surveillance

both F.B.I. agents arrested petitioner. Agent McGoey stated he saw petitioner Legari for just a fleeting moment at the rear of the trailer-truck yet did not him performing any action relating to the subject vehicle.

Agent Ahern stated that he was with Agent McGoey on the date in question and when he entered the parking lot, just ahead of Agent McGoey, observed petitioner closing the left rear door of the trailer-truck in question.

Immediately upon arrest by the two F.B.I. agents, petitioner stated, "You don't want me... I just got here in a cab about five minutes ago. Didn't you see me?"

Agent Ahearn stated that he had the immediate premises under observation for about one hour yet did not see a taxi arrive with petitioner in it.

Upon cross-examination he stated that there was a medium flow of automobile traffic on Utica Avenue along with pedestrians walking on the sidewalk adjacent to the parking lot. However, agent Ahearn did not take careful notice of the other side of Utica Avenue.

Petitioner did not offer any evidence and rested his case.

POINT ONE

PROOF WAS INSUFFICIENT AS A MATTER OF LAW TO ESTABLISH GUILT BEYOND A REASONABLE DOUBT.

Petitioner was never seen in possession of the alleged stolen property and there is no direct proof that he knew that the merchandise in the truck was stolen.

There was conflicting testimony by both F.B.I. Agents regarding Legari's presence at the rear of the truck. One

agent stated he saw petitioner for a fleeting moment -- nothing more than that -- while the other agent stated that he saw petitioner close the left rear door of the truck. However, both agents were together when they made the arrest.

Petitioner is alleged to have stated that he had just arrived by taxi yet both agents disputed this statement by saying they were observing the particular locale for an hour but did not see him arrive. It should be noted that during their hour-long period of surveillance the agents saw all of the other defendants in the parking lot but did not see petitioner until the very moment of his arrest.

Because of the busy traffic flow the agents did not give close attention to the opposite side of Utica Avenue

and therefore it is a reasonable assumption that petitioner did arrive by taxi. The very fact that both agents related a different version of petitioner's presence and alleged actions at the moment of his arrest would compel a conclusion that they were mistaken about his arrival. In any event, though, this fact could not be useful in inferring knowledge of guilt by petitioner.

In essence, the only testimony relating to petitioner is that he was at the rear door of the trailer-truck containing the stolen property. And there being no actual possession of the merchandise it must be assumed that petitioner was in constructive possession, however, it is felt that the facts do not show either a constructive or actual possession thereof. United States v. Nitti, 444 F.2d 1056, 1059.

There mere presence of petitioner in the parking lot would not be sufficient to establish an inference of guilt. United States v. Romano, 3 F.2d 1356 (1965), Tot v. United States, 319 U.S. 463, 467; 87 L.Ed. 1519, 1524; 63 S.Ct. 1241.

In United States v. Vilbotti, 452 F.2d 1186 (2nd Cir. 1971), the Court held: "***the government must establish that the defendants exercised domination or control over the goods".

In the case at bar, petitioner was seen for only a few seconds prior to his arrest. It was held in United States v. Kearse, 444 F.2d 62 (2nd Cir. 1972) that a defendant's momentary presence prior to arrest was legally insufficient to establish any degree of knowledge of guilt sufficient to establish guilt beyond a reasonable doubt.

Briefly stated, the mere presence of petitioner at or near the rear of the truck, whether or not seen closing its door, is insufficient to establish guilt beyond a reasonable doubt.

CONCLUSION

UPON THE FOREGOING A WRIT OF CERTIORARI SHOULD ISSUE IN THE INTEREST OF BASIC JUSTICE.

Respectfully submitted,

Albert J. Brackley
Attorney for Petitioner

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 786, 824—September Term, 1971.

(Argued May 23, 1972 Decided June 21, 1972.)

Docket Nos. 71-1963, 72-1446

UNITED STATES OF AMERICA,

Appellee,

—against—

JOHN MASSAROTTI, JOHN COSMO LEGARI and ANTHONY HENRY BURKEN,

Appellants.

Before:

FRIENDLY, *Chief Judge,*
FEINBERG and TIMBERS, *Circuit Judges.*

Appeals from judgments of conviction entered in the United States District Court for the Eastern District of New York, John R. Bartels, *J.*, after a jury trial, for violation of 18 U.S.C. §§ 659 and 2.

Affirmed.

THEODORE KRIEGER, New York, N.Y., *for Appellant Massarotti.*

ALBERT J. BRACKLEY, Brooklyn, N.Y., *for Appellant Legari.*

PHYLIS SKLOOT BAMBERGER, New York, N.Y. (Robert Kasanof, The Legal Aid Society, on the brief), *for Appellant Burken.*

ANTHONY T. ACCETTA, Assistant United States Attorney (Robert A. Morse, United States Attorney for the Eastern District of New York; David G. Trager, Assistant United States Attorney, on the brief), *for Appellee.*

FRIENDLY, *Circuit Judge:*

John Cosmo Legari and John Massarotti appeal from judgments of conviction entered in October 1971 in the United States District Court for the Eastern District of New York after a jury trial before Judge John R. Bartels. Appellants were found guilty of knowingly receiving and having in their possession stolen merchandise in violation of 18 U.S.C. §§ 659 and 2.[1] Legari was sentenced to two years imprisonment, Massarotti, to imprisonment for 18 months. The only issue raised by appellants is the alleged insufficiency of the evidence with respect to the elements of possession and knowledge. We affirm the convictions.

On the afternoon of October 9, 1969, two FBI agents, Edward J. McGoey and James F. Ahearn, were driving past a small, fenced lot located at 1919 Utica Avenue, Brooklyn, New York. The agents saw an Associated Transport Co. trailer in the lot, parked between two older, possibly abandoned trailers. A truck with a "Brothers Truck Rental" sign was also in the lot, parked back-to-back with

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1 A directed verdict of acquittal was entered in favor of defendant Swift A. Willis. Defendant Anthony H. Burken, who was arrested while behind the wheel of the truck loaded with the stolen merchandise, also appealed. However, counsel for Burken was relieved by this court after filing a brief pursuant to *Anders* v. *California*, 386 U.S. 738 (1967), and Burken's appeal was dismissed as involving no non-frivolous issues.

the Associated trailer. Another truck was parked on the street, blocking the lot's only entrance. The agents thought it unusual for an Associated trailer to be in such a location, so they stopped their car; a subsequent radio check disclosed that the trailer had been stolen two days earlier in New Jersey. Approximately 25 yards from the entrance of the lot, the agents began a surveillance which lasted about an hour. At the outset, Agent McGoey left the car and walked "casually" past the lot. He heard thumping coming from inside the Associated trailer and the Brothers truck. The noise sounded like men transferring the trailer's load to the truck. At about 4:30 p.m., when the Brothers truck began to move, the agents arrested appellants and the two other defendants referred to in note 1 above.

The Government points out that the small lot at 1919 Utica Avenue was hardly a freight terminal or any other place where lawful transfers of goods were likely to occur. Nonetheless, it is clear that evidence showing only appellants' presence in that lot along with the stolen merchandise there is insufficient to establish unlawful "possession" of that merchandise. See *United States* v. *Romano*, 382 U.S. 136, 141 (1965); *United States* v. *Vilhotti*, 452 F.2d 1186, 1188-89 (2d Cir. 1971); *United States* v. *Kearse*, 444 F.2d 62 (2d Cir. 1971); *United States* v. *Casalinuovo*, 350 F.2d 207, 209-10 (2d Cir. 1965). However, the evidence in this case, which we must view in the light most favorable to the Government, shows much more than bare presence.

Legari was arrested by Agent Ahearn while he was closing a rear side door of the Brothers truck. The truck was filled with merchandise transferred from the Associated trailer. Just as Legari was arrested he said to Ahearn: "You don't want me. I just got here in a cab about five minutes ago. Didn't you see me?" In his prior surveillance Ahearn had not seen Legari arrive, nor did

either agent see any vehicle stop and let anyone off at the lot. This false exculpatory statement, coupled with Legari's being caught in the act of closing the "switch truck's" door, is evidence of more than unknowing presence, and, taken together with the other circumstantial evidence, is sufficient to sustain Legari's conviction for knowing possession of the stolen merchandise.

Massarotti fares no better. The evidence indicates that he walked from the lot to the truck that was blocking the entrance to the lot and entered the truck's cab. Simultaneously, the Brothers truck (the "switch truck") began to move from the lot. At that point the arrests were made. Massarotti owned the truck he was arrested in, and from the evidence, the jury could have concluded that Massarotti either borrowed or stole the Brothers truck.[2] Further, since merchandise was still left in the Associated trailer, the jury could reasonably infer that Massarotti's truck was destined to be loaded with the trailer's remaining goods. Finally, admissions by Massarotti were introduced. These statements were to the effect that someone approached him in Manhattan and offered him $100 to take a truck over to 1919 Utica Avenue and there "transfer the contents of a trailer," and that Massarotti thought that "everything might not be all right" with the goods. The jury was certainly entitled to take Massarotti at his word and to infer that he was in fact helping to transfer the stolen goods in the Associated trailer at the time of his arrest. In sum, there was again much more here than mere presence.

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2 Massarotti admitted to an FBI agent that he had asked "an individual by the name of Dominick . . . if he could borrow a truck to take to Brooklyn." Dominick Cavalieri testified for the Government that he knew Massarotti "from down at the [meat] market," that Cavalieri used the Brothers truck intercepted at the lot in his business, and that he did not loan the truck to Massarotti.

Without getting into the controversy over the proper standard of review to test the sufficiency of evidence in this criminal case, see *United States* v. *Iannelli*, —— F.2d ——, —— n.4 (2d Cir. May 22, 1972), we hold that under any of the formulations this court has used, there was sufficient evidence against both Massarotti and Legari for the jury to find knowing possession of the stolen merchandise.

Judgments affirmed.

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-first day of June, one thousand nine hundred and seventy-two.

Present:

HON. HENRY J. FRIENDLY,
Chief Judge
HON. WILFRED FEINBERG,
HON. WILLIAM H. TIMBERS,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN MASSAROTTI, JOHN COSMO LEGARI, ANTHONY HENRY BURKEN and SWIFT ARNOLD WILLIS,

Defendants,

JOHN MASSAROTTI, ANTHONY HENRY BURKEN, and JOHN COSMO LEGARI,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and it hereby is affirmed as to appellants John Massarotti and John C. Legari in accordance with the opinion of this court.

A. DANIEL FUSARO,
Clerk
by VINCENT A. CARLIN
Chief Deputy Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-296

JOHN COSMO LEGARI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted in the Eastern District of New York of knowingly receiving and having in possession stolen merchandise in violation of 18 U.S.C. 659. He was sentenced to imprisonment for two years. The court of appeals affirmed on June 21, 1972 (Pet. App. A1-A5). The petition for writ of certiorari was not filed until August 21, 1972, and is out of time under Rule 22(2) of the Rules of this Court. There is, in any event, no reason to grant the writ.

The sole issue raised on appeal and in this Court is the sufficiency of the evidence to support the conviction. The opinion of the court below demonstrates that there was ample evidence to support the jury's verdict, including the fact that petitioner was arrested in the act of closing the door of the truck to which the stolen merchandise had just been transferred, and gave a false exculpatory statement. Further review is not warranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1972.

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